



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Holmes & Narver, Inc.

File: B-239469.2; B-239469.3

Date: September 14, 1990

William A. Roberts, III, Esq., Howrey & Simon, for the protester.

Richard L. Hames, Esq., Davis Wright Tremaine, for Raytheon Services Nevada, an interested party.

Budd B. Bornhoff, Jr., Esq., Department of Energy for the agency.

John W. Van Schaik, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that proposed awardee's employment of former employee of University of California who served as technical advisor to agency task force constitutes a conflict of interest which should disqualify firm from award is denied where there is no evidence that as a result of task force duties he received any procurement sensitive information or information that was otherwise competitively useful and not available to other offerors, particularly the protester, a long-term incumbent.

2. Protest that under Department of Energy alternative source selection procedures agency erred in selecting only a single offeror for final negotiations leading to award is denied where the record supports the agency's selection decision based on the technical superiority of the awardee's proposal.

3. Although solicitation did not separately list as evaluation factors or subfactors the use of subcontractors or the extent of reliance on subcontractors, those issues are logically and reasonably related to "Organizational Structure and Staffing Plan" evaluation factor and therefore were properly considered by evaluators.

4. Cost evaluation under a solicitation for a cost-plus-award-fee operation and management contract which did not compare total cost estimates for each offeror was consistent

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with solicitation which indicated that nature of the management and operating services did not permit reasonably accurate estimating of total cost of performance.

5. Standard for discussions announced in Department of Energy alternative source selection guidelines is not substantially different from standard used by General Accounting Office in determining whether meaningful discussions were held under procurements conducted pursuant to "traditional" negotiation procedures.

6. The fact that more extensive discussions are held with one offeror does not mean that offerors were treated unequally as the extent of discussions may vary among offerors as dictated by the different matters of concern raised by different proposed approaches.

DECISION

Holmes & Narver, Inc. protests the award of a contract to Raytheon Services Nevada under request for proposals (RFP) No. DE-RP08-89NV10833 issued by the Department of Energy (DOE) for management, operating and technical services. The procurement was conducted in accordance with DOE's alternative source selection procedures which allow limited discussions with offerors in the competitive range and the selection of one or more offerors for final negotiations and award. Holmes argues that DOE improperly selected only Raytheon for final contract negotiations after conducting a deficient evaluation and that Raytheon had an unfair competitive advantage.

We deny the protest in part and dismiss it in part.

BACKGROUND

The solicitation was for a cost-plus-award-fee management and operating (M&O) type of contract for a wide range of technical, management and engineering services related to both surface and subsurface facilities for underground nuclear explosives testing and other technical projects at DOE's Nevada Test Site and Johnston Atoll complex. The period of performance is to be 5 years.

The RFP indicated that award would be made to the offeror with no foreign ownership whose offer, conforming to the RFP, was most advantageous to the government considering the listed evaluation factors. The RFP also stated that proposals would be evaluated in accordance with the specific procedures and criteria set forth in DOE's Acquisition Regulations Handbook--Source Evaluation Board (SEB

Handbook). The solicitation included the following technical evaluation factors: (1) Qualifications of personnel; (2) Qualifications of firm; (3) Organizational structure and staffing plan; and (4) Work plan. Of the four technical factors, which were to be numerically scored, the first two were of equal importance and were to have the greatest weight while the third and fourth were also of equal importance and were to be given less weight than the first and second. The RFP also included the following business and management evaluation factors listed in descending order of importance: (1) Corporate commitment, (2) Work authorization, reporting, and cost control; (3) Labor relations; (4) Recruitment and compensation plans; and (5) Phase-in plan. The business and management factors were to be adjectivally rated.

The RFP further provided that cost proposals, "while necessarily limited by the nature of the contract type," should demonstrate the offeror's understanding of the magnitude and significance of the required effort. Also, cost and fee information was to be reviewed to determine reasonableness in relation to the scope of work, understanding of the government's desire for efficient and cost conscious operations and the offeror's commitment to accept some risks of operation.

The RFP stated that the technical factors would be of greatest importance with the business and management considerations next. Also, according to the RFP, cost considerations were not to be "scored or rated" and would have less significance than technical and business/management factors. The solicitation stated, however, that cost could be a determining factor for selection among proposals "that are otherwise relatively equivalent" and business/management advantages would be weighed against cost considerations to determine whether better technical business/management proposals are worth evaluated cost differentials.

Six firms submitted proposals in response to the RFP. Based on the initial evaluation, the agency created a competitive range consisting of Holmes, Raytheon and Kaiser Engineers Nevada. The agency's source evaluation board (SEB) held written and oral discussions with the three competitive range offerors and requested revised offers from each. The SEB reevaluated the proposals after the submission of the revised offers, resulting in the following scores and rankings for the awardee and the protester:

Evaluation factors	Raytheon	Holmes
Technical:		
1. Qual. of personnel	270	240
2. Qual. of firm	270	240
3. Org. structure	180	160
4. Work plan	<u>160</u>	<u>160</u>
Totals	880	800
Business & management		
1. Corp. commitment	01/	G
2. Work auth./control	0	G
3. Labor relations	0	G
4. Recruit/comp. Plan	G	G
5. Phase-in plan	<u>G</u>	<u>S</u>
Totals	0	G

Based on the SEB's evaluation, DOE's source selection official (SSO) selected Raytheon as the awardee. According to the SSO's selection statement, the three competitive range offers were very high in quality and demonstrated that each of the firms was capable of supporting the Nevada operations. Nevertheless, the SSO felt that there were notable differences in the strength of the firms. In this regard, the SSO was impressed by Raytheon's uniformity of excellence under all of the evaluation criteria and he noted that Raytheon was rated highest in seven of the nine evaluation factors. According to the SSO, he was persuaded by the fact that Raytheon will accomplish the diverse contract requirements as a single, fully integrated contractor. Also noteworthy, according to the SSO, was Raytheon's corporate commitment to absorb all phase-in costs and its investment to acquire Fenix & Scisson of Nevada, the incumbent contractor for drilling and mining engineering work.

The SSO indicated that his decision was made more difficult by DOE's long-standing relationship with Holmes, the incumbent contractor for more than 30 years on a significant portion of the activities under the contract. The SSO's statement indicates that he considered this factor and determined that the merits of Raytheon's proposal outweighed the advantages of awarding to Holmes, the incumbent. As far as cost was concerned, the SSO indicated that because this was an M&O effort only limited cost data was requested and evaluated. The SSO concluded that while some cost

1/For the Business & management factors, the SEB used adjectival ratings of outstanding, good, satisfactory, poor and unsatisfactory.

differences existed they were not significant and did not provide a "substantive basis for differentiating between the offerors."

In accordance with the alternative source selection procedures spelled out in DOE's SEB Handbook, the agency then conducted final negotiations with Raytheon. DOE has not yet awarded the contract to Raytheon.

PROTEST ALLEGATIONS

Holmes protested to this Office on April 27, contending that it should not have been excluded from the final negotiations because the agency had not determined that Raytheon's proposal was clearly superior to that of Holmes. Also, Holmes argued that the solicitation did not place offerors on notice of a requirement to minimize major subcontractor involvement or the weight that would be given to subsurface capabilities in the evaluation. Further, according to Holmes, the use of these unstated factors was magnified by the agency's failure to identify as a weakness during negotiations Holmes' use of a major subcontractor and the failure to afford equally detailed negotiations to Holmes and Raytheon.

On May 8, Holmes filed a second protest in which it argued that Raytheon's proposed program manager, Mr. Bill W. Colston, who previously served as a technical advisor to a DOE task force, may have had access to information not available to other offerors that afforded Raytheon an unfair competitive advantage since he assisted in preparing the firm's proposal. Specifically, Holmes argued that Mr. Colston was given a tour of the Nevada Test Site in conjunction with his task force duties 4 1/2 months before the official site visit associated with the M&O procurement and on that tour he may have been provided procurement sensitive information or other useful information that was not available to other offerors. Holmes also argues that Raytheon's program manager did not have experience managing the type of operations described in the RFP and his position with the task force and other work for DOE may have given him access to information that constituted the basis for DOE's conclusion that he was qualified. Holmes also argued that although Raytheon was given credit for "excellent, and comparable firm experience," Raytheon does not have experience comparable to Holmes in maintaining and operating facilities.

Finally, on June 25, Holmes filed a third protest in which it argued that another individual who assisted in preparing Raytheon's proposal afforded Raytheon an unfair competitive

advantage by virtue of his employment by DOE, until he retired in February 1988, and his subsequent employment as a consultant working for Reynolds Electrical and Engineering Company (REECO) under another DOE contract. Holmes maintains that before his retirement from DOE this individual, Mr. Robert W. Taft, was a contracting officer and had contract administration responsibilities over a Holmes contract for services which are identical to some of those to be performed under the proposed M&O contract. Also, according to the protester, while working as a consultant, this individual had contacts with high level DOE officials at the Nevada Operations Office. Holmes argues that Mr. Taft's involvement with Raytheon as early as January 1989, while he was still a consultant to DOE, strongly suggests that Raytheon was receiving inside information not available to the public and, at a minimum, created an appearance of a conflict of interest.

ALLEGED UNFAIR COMPETITIVE ADVANTAGE

We first address Holmes' position that the award to Raytheon was tainted by that firm's hiring of Mr. Colston and Mr. Taft to assist in preparing its proposal. We conducted a formal conference on the record to determine whether information given to Raytheon's program manager, Mr. Colston, during his tenure as advisor to DOE's task force was either procurement sensitive or of such a nature so as to give Raytheon, his current employer, an unfair competitive advantage under the RFP. Mr. Colston and the chairman of DOE's SEB for the M&O contract testified and were subject to cross examination at the conference.^{2/} Our conclusions as to the facts relating to these issues are based on the testimony and various affidavits submitted to our Office.

From 1983 until August 1986, Mr. Colston was employed by the University of California and worked at the Los Alamos National Laboratory, which is managed and operated for DOE by the University of California. From August 1986 until June 26, 1989, also as an employee of the University of California, he served as a technical advisor to the Assistant Secretary of the Department of Energy for Defense Programs. Conference transcript (Tr.) at 10. From February 1988 until June 26, 1989, he was one of six technical advisors to DOE's Modernization Task Force, the purpose of which was to examine and report on the overall

^{2/} During the time he was participating on the SEB, the SEB chairman was Director of DOE's Engineering and Energy Management Division at the Nevada Operations Office.

size and productive capacity of DOE's Nuclear Weapons Complex necessary to support long-term security objectives. Tr. 10-11.^{3/}

Mr. Colston also served as a technical advisor to DOE's Modernization Implementation Task Force, an ad hoc group which was to assist in pursuing DOE's modernization plans for the Nuclear Weapons Complex. Tr. 12-13. This second task force, which was never formalized, was to help DOE prioritize the work recommended by the Modernization Task Force. Tr. 12-13.

In order to carry out its duties, the Modernization Task Force collected studies of future workloads and requirements, nuclear weapons studies, the annual Presidential stockpile memorandum and information provided by briefings during site visits. According to an affidavit prepared by the director of both task forces, none of this information related to procurements at the Nevada Operations Office. Affidavit of task force director, ¶ 2.

In early May 1989, Mr. Colston interviewed with Raytheon for a position with the firm and, in mid-May, Raytheon informally offered him the position as President and program manager of Raytheon Services Nevada, an affiliate created to compete for and perform the Nevada M&O contract. Tr. 16-18, 69-70. Mr. Colston decided to accept Raytheon's offer on May 24 or 25 and the offer was formally extended on June 1. Tr. 18-19. By memorandum dated May 26, Mr. Colston informed the director of the task force that he had accepted the position with Raytheon. Tr. 19.

In late May, Mr. Colston was asked to accompany the task force director on a visit to the Nevada Test Site to review the priorities it had assigned to proposed construction projects. Tr. 15, 20-22. Mr. Colston asked the task force director if his impending employment with Raytheon presented a problem with his going to the test site and the director indicated that he thought it would not be a problem because the activities of the task force were far removed from procurement activity. Tr. 45-46.

^{3/} The Nuclear Weapons Complex includes all DOE facilities for nuclear weapons research, development and testing, nuclear materials production, nuclear weapons components manufacture and assembly of nuclear weapons. It consists of 15 major facilities dispersed throughout the United States. Tr. 11, 34; Mr. Colston's affidavit ¶ 8.

On May 30 and 31, Mr. Colston accompanied the task force director to the Nevada Test Site. Tr. 15. On May 30, they attended a 3 hour briefing by test site officials which included the SSO and the chairman of the SEB. The purpose of that briefing was to discuss the priorities assigned to construction projects by the test site. Tr. 21.

Mr. Colston testified that at the start of the briefing, he announced that he was going to work for Raytheon. Tr. 20-21. The SEB chairman testified that he did not recall this announcement but could not say that it did not occur. Tr. 115. According to Mr. Colston's testimony, which was verified by the SEB chairman, the briefing had nothing to do with either the ongoing M&O contract or the planned procurement. Tr. 22-23. 116-117, 121, 123-6. The briefing covered construction projects proposed by the test site and priorities assigned to particular projects. Tr. 22-24.

On the remainder of May 30 and on May 31, DOE employees, including the SEB chairman, gave Mr. Colston and the task force director a tour of the Nevada Test Site. Tr. 24-26. At several locations, government officials or contractor employees, including Holmes employees on one occasion, provided tours or briefings. Tr. 26, 42-43, 59-60.

After the site visit, Mr. Colston spent most of the remainder of his time with DOE working on non-task force related work involving another DOE facility. Tr. 62-63. Mr. Colston began his employment with Raytheon on June 26. Tr. 62-63. In that position, he began structuring the organization that Raytheon would propose to DOE for the M&O contract. Tr. 73-75.

DOE issued the RFP for the M&O contract on September 21, 1989, and conducted a 1-day site tour for all offerors in October. During that tour, DOE took offerors' representatives to approximately ten locations at the Nevada Test Site. Tr. 107-109. The purpose of the site tour was to give offerors an idea of the size of the test site and to show them the type of engineering work done by Holmes and Fenix & Scisson. Tr. 108-109. During the tour, representatives of Holmes and other contractors and DOE employees gave briefings or were available at the various locations to answer questions. Tr. 107-108.

With respect to the other individual alleged to have created an unfair competitive advantage, prior to March 1985, but not after that date, Mr. Taft was the contracting officer for a number of contracts under which Holmes

provided services to DOE at the Nevada Operations Office.^{4/} After that, Mr. Taft was, until his retirement in February 1988, a DOE Assistant Manager for Engineering & Safety and also was detailed as Assistant to the Manager for Science in DOE's Nevada Operations Office.

After his retirement from DOE, Mr. Taft took a position with REECO. In that capacity, in response to purchase requisitions issued by DOE, Mr. Taft is periodically called on "to provide technical/professional reports detailing the discussions and activities of various town meetings, as requested" According to the statement of work which accompanied the purchase requisitions, Mr. Taft could be called on to provide briefings at town meetings in the surrounding community on the activities of the Nevada Test Site and to provide DOE with reports on those meetings, DOE's community monitoring program and on certain radiological, environmental and nuclear weapons issues. The statement of work also indicates that Mr. Taft could be called on to provide coordination between DOE and other participants in town meetings, attend and participate in training sessions, review books and publications on radiation, environmental activities and nuclear weapons issues and visit various sites where radiation and/or environmental activities require inspection and reporting.

According to an affidavit submitted by DOE's contracting officer, Mr. Taft had no responsibility for and played no role in developing any procurement sensitive information relative to the latest M&O solicitation. Also, the contracting officer indicates that she is unaware of any inside information that was available to Mr. Taft that could have resulted in an unfair competitive advantage. Based on her discussion with the SSO, the contracting officer also states that no information even remotely related to the M&O solicitation was discussed with Mr. Taft.

Analysis

An agency may exclude an offeror from the competition because of an apparent conflict of interest in order to protect the integrity of the procurement system, even if no actual impropriety can be shown, so long as the determination is based on facts and not mere innuendo or

^{4/} The formal conference did not include the contentions relating to this individual.

suspicion. Lasar Power Technologies, Inc., B-233369, et al., Mar. 13, 1989, 89-1 CPD ¶ 267; NKF Eng'g, Inc., 65 Comp. Gen. 104 (1985), 85-2 CPD ¶ 638; NKF Engineering Co. v. United States, 805 F.2d 372 (Fed. Cir. 1986); CACI, Inc.--Federal v. United States, 719 F.2d 1567 (Fed. Cir. 1983). Our review is to determine whether the agency has a reasonable basis for its decision to allow an offeror to compete in the face of an allegation or indication of an apparent conflict of interest. Lasar Power Technologies, Inc., B-233369, supra.

Based on our review of the record, which includes the testimony of Mr. Colston and the SEB chairman, we do not find a conflict that justifies precluding Raytheon from the award. There is no evidence in the record that, as a result of his task force duties, Mr. Colston received any procurement sensitive information or any competitively useful information not available to other offerors, particularly Holmes, a long-term incumbent M&O contractor for a large portion of the services for more than 30 years.

To start with, the task forces to which Mr. Colston served as an advisor were not concerned in any meaningful way with the Nevada Operations Office M&O procurement. An affidavit submitted by the task force director and other information in the record indicates that the purpose of the task forces was to study DOE's entire Nuclear Weapons Complex and develop plans for modernization to support long-term national security objectives. Under the circumstances, there was no reason for the task forces to collect information on the performance of the incumbent Nevada M&O contract or the competition for the new contract and there is no evidence in the record that such information was collected. In fact, the SEB chairman, whose office was the primary source at the Nevada Test Site for information for the task forces, testified that information given to the task force related primarily to construction and facilities planning and not the M&O contract.

Holmes asserts that through the site tour Mr. Colston was given "information that an intelligent bidder would find helpful in preparing a proposal and competing for the M&O contract." Nonetheless, despite extensive questioning of both Mr. Colston and the SEB chairman, Holmes has been able to produce no convincing examples of such information. Holmes notes that Mr. Colston's testimony indicated that he learned that Holmes provided support for the device assembly facility and that Holmes' manager of that facility was a "bright guy." Tr. 54. Also, according to Holmes, Mr. Colston saw, at least in part, what Holmes and Fenix & Scisson did at the Nevada Test Site and "learned

certain things about their organizations and personnel." Although Holmes argues that none of this information was available to other offerors, clearly this information and much more was available to the protester, the incumbent M&O contractor for more than 30 years.

Again, given the purpose of the task forces, we find entirely credible the testimony of Mr. Colston and the SEB chairman that Mr. Colston was not given access to procurement sensitive information or other competitively useful information not available to other offerors.^{5/} Furthermore, we fail to comprehend how any of this information, which for the most part appears to be of a superficial nature in relation to the complex task of operating these enormous facilities, could have possibly prejudiced the position of a long-time incumbent like Holmes.

With respect to Mr. Taft, the consultant to REECO, we do not find any apparent or actual conflict of interest that justifies excluding Raytheon from the award. Holmes has alleged, and Raytheon has not denied, that starting in January 1989 Mr. Taft assisted in preparing Raytheon's proposal for the M&O solicitation. Nonetheless, the record indicates that by that time, Mr. Taft had not directly worked for DOE for almost a year, had not been a contracting officer or been involved in administration of any contract for similar services for almost 4 years and there is no evidence that he was involved in preparing the solicitation or any other procurement sensitive information for the current M&O procurement. Also, according to DOE, contracting officials did not discuss with Mr. Taft any information related to the procurement.

Mr Taft's work for DOE through REECO after his retirement from DOE appears to relate primarily to the agency's community outreach and education programs. Although that work likely gives him access to agency officials, there is no evidence in the record, and no reason to assume, that

^{5/} Holmes makes much of the fact that DOE officials, including the SEB chairman, allowed Mr. Colston to participate in the site tour after he announced that he had taken a position with Raytheon, a prospective competitor. Although, agency officials have a duty to protect from disclosure competitively sensitive information, since the purpose of the site visit and the task forces had nothing directly to do with the M&O procurement, and there is no reason to doubt the testimony that Mr. Colston was not given procurement sensitive information, we do not believe there was any reason to exclude him from the briefing.

Mr. Taft was given access to procurement sensitive information or competitively useful information not generally available to the public. Thus, Mr. Taft's activities provide no basis on which to question an award to Raytheon.

SELECTION DECISION

Holmes argues that DOE failed to maximize competition and did not adhere to the SEB handbook by restricting final negotiations to Raytheon although there were no significant differences between the Raytheon and Holmes proposals. According to Holmes, the SSO selection statement established a high degree of equivalence between its proposal and that of Raytheon and the few distinctions identified were arbitrary or not based on the RFP evaluation criteria. Holmes also argues that the SEB erroneously evaluated the Holmes and Raytheon program managers as equivalent. Finally, Holmes argues that DOE failed to perform an estimated probable cost evaluation as required by the RFP and the SEB handbook and did not consider cost as a significant factor in the selection decision as required by law and failed to hold meaningful discussions with Holmes.

The Competition in Contracting Act of 1984, sets forth a requirement that executive agencies, in conducting procurements for supplies or services, shall obtain "full and open" competition through the use of competitive procedures, i.e., either sealed bid or competitive proposals (negotiation). 41 U.S.C. § 253(a)(1)(A) (1988). The Federal Acquisition Regulation (FAR) mirrors this statutory requirement by providing that the purpose of source selection procedures in competitive negotiated acquisitions is to "maximize competition." FAR § 15.603(a).

In "traditional" competitive negotiation procedures, contracting agencies are generally required to conduct negotiations with all responsible offerors whose proposals are in the competitive range, i.e., all proposals that have a reasonable chance of being selected for award. FAR §§ 15.609(a), 15.610(b); NUS Corp.; The Austin Co., B-221863; B-221863.2, June 20, 1986, 86-1 CPD ¶ 574, aff'd, Roy F. Weston, Inc.--Recon., B-221863.3, Sept. 29, 1986, 86-2 CPD ¶ 364. Upon completion of discussions and the request for and evaluation of best and final offers from all competitive range offerors, the designated source selection official selects, from among the competitive range offerors, that source whose final offer is most advantageous to the government, considering price or cost and the other factors listed in the solicitation. FAR §§ 15.611(a) and (d).

Nonetheless, the FAR also permits agencies to use alternative source selection procedures that limit discussions with offerors during the competition. FAR § 15.613(a) and (b). DOE's alternative source selection procedures set out in the SEB handbook are authorized for procurements expected to exceed ten million dollars in value. DOE Acquisition Regulation, 48 C.F.R. § 915.613. (1989). Those procedures depart from "traditional" competitive negotiation procedures since they permit the conduct of final contract negotiations with only one offeror, although the final selection may also be made after definitive contracts have been negotiated with more than one offeror. Under DOE's alternative procedures the government is required to select more than one offeror for final negotiations when, as described in DOE's SEB handbook, "the evaluation is so close as to not provide meaningful discrimination among the offerors." See NUS Corp.; The Austin Co., B-221863; B-221863.2, supra. Although Holmes argues that DOE's selection of only Raytheon for final contract negotiations was not justified, we believe that the record supports the SSO's decision that the Raytheon's proposal was superior to Holmes'.

The evaluation record shows that Raytheon was scored or rated higher than Holmes on seven of the nine technical and business/management evaluation factors and equal on the other two. The SSO cited as noteworthy Raytheon's proposal to perform the contract as a single fully integrated contractor and Raytheon's corporate commitment to absorb all phase-in costs and to acquire Fenix & Scisson, the incumbent drilling and mining support contractor. Holmes argues that the ratings do not reflect any significant technical or business/management differences and disparages the distinctions drawn between the two proposals by the SSO. For example, Holmes argues that the SSO should not have credited Raytheon with proposing to perform as a single integrated contractor while marking Holmes down for its proposal to use a major subcontractor for subsurface work. The protester says that Raytheon also proposed the use of subcontractors and challenges the agency's conclusion with respect to Holmes' proposal that "[a]n inherent difficulty with major subcontracting in M&O contracting involves adequate integration of the subcontractor into the organizational structure and the work plan."^{6/} According to Holmes, DOE

^{6/} In this argument, Holmes' makes use of information which Holmes and Raytheon consider proprietary and which was exchanged between outside counsel to those firms under an agreement that protected that information from release to

(continued...)

has not justified how a subcontractor integrated to the degree proposed by Holmes represents a disadvantage when compared to the approach of other offerors and, in the protester's view, the agency applied criteria unstated in the solicitation when the evaluators made distinctions between the use by Holmes of a "major" subcontractor as opposed to "minor" subcontractors proposed by other offerors.

In reviewing protests of allegedly improper evaluations, we will not substitute our judgment for that of the agency's evaluators but rather we will examine the record to determine whether the evaluators' judgments were reasonable and in accord with listed criteria and whether there were any violations of procurement statutes or regulations. Spectra Technology, Inc.; Westinghouse Electric Corp., B-232565; B-232565.5, Jan. 10, 1989, 89-1 CPD ¶ 23. Although the use of subcontractors and the extent to which an offeror proposed to rely on subcontractor support were not separately listed as factors or subfactors in the RFP, these issues are logically and reasonably related to the "Organizational Structure and Staffing Plan" evaluation factor and therefore were properly considered by the evaluators. Unidynamics/St. Louis, Inc., B-232295, Dec. 21, 1988, 88-2 CPD ¶ 609.

The record shows that the evaluators were aware of and considered Raytheon's use of subcontractors--which was much less extensive than the protester's--and concluded that Raytheon's proposed approach was preferable to that of Holmes. The evaluators concluded that an inherent and notable weakness in Holmes' proposal was not necessarily the mere use of a large subcontractor but the protester's particular manner of integrating that subcontractor into its proposed structure which, in their view, resulted in the dispersal of staff and organizational units of that major subcontractor throughout its proposed organization, which had the potential for creating management problems. Although Holmes disagrees with that assessment, that disagreement provides us with no grounds to overturn DOE's conclusion which, in our view, is an essentially reasonable one.

Holmes also argues that the SSO's consideration of Raytheon's corporate commitment to absorb phase-in costs and to acquire Fenix and Scisson was illogical and inconsistent

6/(...continued)

their clients. Under the circumstances, our discussion of this issue will necessarily be limited.

with the solicitation evaluation criteria. According to Holmes, these matters are not reasonably related to the corporate commitment factor under which they were credited to Raytheon. DOE, on the other hand, explains that Raytheon's offer to absorb phase-in costs and its acquisition of Fenix & Scisson were notable and properly considered under that factor.

Under the corporate commitment business/management evaluation factor, the RFP stated:

"The offeror's proposed continuing relationship with the corporate office(s) will be evaluated with respect to: involvement of senior corporate management including provisions for routine assessments of work accomplishment; and proposed access to and cost effectiveness of using a broad relevant technical and business management resource base; and placement of the proposed organization within the overall corporate organization structure."

Although the SSO, in justifying his selection decision, specifically referred to Raytheon's corporate commitment to absorb phase-in costs and to acquire Fenix & Scisson, the SSO's selection statement cited three other reasons for concluding that Raytheon demonstrated "excellent corporate commitment." The selection statement also indicated that Raytheon's corporate commitment was demonstrated by its proposal to absorb the salary impact of top level personnel caused by government salary ceilings, the provision of corporate oversight audits and the extensive interest exhibited by corporate management in the contract.

We believe the SSO's reasons for crediting Raytheon with excellent corporate commitment were logically and reasonably encompassed within the corporate commitment evaluation factor. Although, as Holmes argues, an offeror's willingness to absorb phase-in costs was not explicitly covered by the corporate commitment subfactors listed in the RFP, we do not believe that it was unreasonable for the SSO to cite this matter as an example of Raytheon's corporate commitment to the project. Nor do we believe that the awardee's outstanding rating under this factor was dependent on the phase-in cost aspect of the evaluation as the record shows that several other significant elements contributed to the rating.

Holmes also argues that DOE's evaluation of each firms' proposed program manager was flawed because there is no support for the SEB's conclusion that the program managers

proposed by Holmes and Raytheon were equivalent.^{7/} According to Holmes, in spite of the fact that Mr. Colston, Raytheon's manager was given credit for "a proactive management style with a unique understanding of DOE M&O contract relationships," Mr. Colston's managerial experience is outdated or irrelevant compared to that of Holmes' manager.

We have no basis to disagree with DOE's judgment that the Holmes and Raytheon program managers were equivalent. DOE explains that it determined that Mr. Colston has extensive relevant experience including experience as a DOE area manager at facilities operated by M&O contractors, management experience with M&O contractors and other experience with private industry. Holmes does not state that Mr. Colston lacks the experience called for by the solicitation but merely argues that his experience is not as recent as or as good as the experience of its own manager. There is nothing in this record, which includes his resume and his answers to questions at our formal conference, that persuades us that DOE's conclusion that Mr. Colston would make an excellent manager was in any way unreasonable. Holmes' narrow reading of the solicitation to require experience that precisely parallels the proposed M&O effort would practically assure an incumbent, such as Holmes, of receiving the highest technical and management ratings simply by virtue of its incumbency and, in our view, that reading is unreasonable.

In sum, we have reviewed the SSO decision statement along with the lengthy SEB report in the context of the protester's arguments and we find that the SSO reasonably concluded that there existed a meaningful distinction between the Holmes' and Raytheon proposals and that Raytheon's proposal was superior. That distinction was centered on Raytheon's overall higher rating by the SEB, its integrated unitary structure and its corporate commitment.

^{7/} Holmes also argued in its May 8 protest that Raytheon does not have experience as an M&O contractor comparable to that of Holmes and, contrary to the evaluation criteria, DOE improperly concluded that Raytheon has "excellent, comparable firm experience in all the technical disciplines." In its report DOE responded that Raytheon in fact does possess extensive, comparable and relevant experience as required by section M. 4(a)(2) of the RFP evaluation criteria, "Qualifications of the Firm." In its comments on the agency's report, Holmes does not further pursue this issue. For this reason, we have no basis to challenge DOE's evaluation of Raytheon's experience.

It is clear that the protester does not share the SSO's view but there is a basis in the evaluation record to support each of the enumerated strengths in the Raytheon proposal and thus it is not appropriate for us to substitute our judgment for that of the agency.

Next, Holmes argues that the selection was improper because DOE did not establish an estimated most probable cost for the total contract effort for each offeror and did not determine the possible cost differential of performance by Holmes as opposed to Raytheon although in the protester's view the solicitation and the SEB handbook required that this be done. As Holmes notes, the RFP at the "General" evaluation section M.1(a) states that the evaluation would include each offeror's "probable cost to the government" and the SEB handbook which is referred to in the solicitation says in one section that "the [SEB] will evaluate the cost or price information submitted and develop the estimated probable cost to the Government for each offeror in the competitive range."

When the solicitation is read as a whole, and in the context of the clarification included in a subsequent amendment, it is evident that DOE did not contemplate establishing and comparing total cost estimates for each offeror in this particular M&O procurement. Section M.5 of the RFP, which referred specifically to the cost considerations to be considered in the evaluation, stated that cost proposals were "necessarily limited by the nature of the contract type" but should demonstrate that the offeror understands the required effort. Also, according to that section, cost and fee information was to be reviewed in terms of reasonableness in relation to the scope of work, the offeror's understanding of the government's desire for more efficient and cost conscious operations and the offeror's commitment to accept some risks of operation. According to section M.3 of the solicitation, cost was described as a factor in the selection only if proposals were otherwise "relatively equivalent."

Most important to the extent that there was any confusion as to the nature of the cost evaluation to be performed under the RFP, DOE clarified this issue in response to a preproposal conference question as to how the government would "determine cost differentials and the cost ranking of competing offerors." DOE's answer, which was included in an RFP amendment, was that there would be no overall determination of contractor cost since this would be "contrary to the concepts underlying management and operating, cost-plus-award-fee contracting, wherein uncertainties involved in the contract performance do not permit accurate estimating of

total cost." Also, DOE indicated that there would be no ranking based on total cost and cost proposals would be evaluated in accordance with section M.5. which would include comparisons between offerors.

We conclude that DOE performed the cost evaluation in the manner that it said it would in the solicitation as amplified by the RFP amendment and, contrary to the protester's contention, that the SSO properly considered cost in his decision to select Raytheon for final contract negotiations.^{8/} The SEB report indicates that because the M&O contract for the Nevada Test Site contemplates the use by the contractor of budgeting and accounting systems integrated with those of DOE, only limited cost information was requested and evaluated. Nonetheless, the SEB considered and compared in detail for the three competitive range offerors key and core personnel salaries; transition period costs; home office costs, employee benefits and compensation costs; and proposed fees.

Based on that evaluation and in accordance with the primary propose for the cost information set out in the RFP, the SSO concluded all three competitive range offerors were financially capable of performing the contract and understood the scope of work and DOE's fee policies. The SSO also concluded that the cost information provided by all three offerors was reasonable and, while there were some cost differences among the offerors (for instance, the SSO noted that Holmes is more cost conservative than the other offerors) these issues were not significant in relation to the total value of the contract (approximately \$600 million for the 5-year effort) and thus, did not provide a basis for differentiating among offerors.

We have reviewed the records pertaining to the limited cost evaluation conducted by DOE and we find that it was consistent with the agency's announced scope of that evaluation. Further, we find that the results of that

^{8/} To the extent that Holmes argues that the agency was required to develop a probable estimate of the overall cost of each offeror's proposal and to compare those estimates even though the agency maintains that because of the nature of this effort such estimates are not at all meaningful, we think the protest is untimely as, in our view, offerors were informed of the agency's intent in the RFP as amended. If Holmes disagreed with DOE's intent to conduct only a limited cost evaluation it was required to object prior to the due date for receipt of proposals. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1990).

evaluation were in fact considered by the SSO in his final selection and we have no basis to disagree with his conclusion that in this instance, where there existed a clear technical differentiation among the proposals, cost was not significant.

Finally, Holmes argues that DOE failed to raise in discussions its concern that Holmes had a weak phase-in plan and, although in discussions DOE expressed concern that Holmes' manager of Environmental Safety and Health (ES&H) was not qualified and that Holmes proposed a subcontractor for subsurface activities, the agency failed to disclose the actual nature of its concerns in these areas.

Under the alternative selection procedures used by DOE in this M&O procurement, the extent of discussions to be held with offerors in the competitive range was set forth in the SEB handbook, paragraph 308. That section provides in essence that discussions shall point out aspects of the proposal which are not clear or are unsubstantiated but that where the meaning of a proposal is clear and it contains a "weakness which is inherent in an offeror's management, engineering or scientific judgment or is the result of its own lack of competence or inventiveness," that weakness need not be pointed out unless it can be done without the risk of technical transfusion. We do not think that the standard for discussions announced in the SEB handbook is substantially different from that used by our Office in determining whether meaningful discussions were held under comparable procurements conducted pursuant to "standard" negotiation procedures. See Furuno USA, Inc., B-221814, Apr. 24, 1986, 86-1 CPD ¶ 400. In Furuno, we stated that offerors are not entitled to all-encompassing discussions that include the pointing out of every technically acceptable element of a proposal that has received less than the maximum score, but that the agency generally must lead the offeror into the areas of its proposal which require amplification. In our view, the discussions conducted here meet either standard.

DOE did not address in discussions its concern regarding the lack of detail in Holmes' proposed phase-in plan. Nonetheless, the SEB did not consider this a significant weakness due to Holmes' incumbency and thought that Holmes' phase-in plan would be easily correctable. In fact, according to DOE, the SEB informed the SSO that this was not a significant matter and should not be used as a discriminator between the proposals. The SSO did not mention this as a significant matter in his decision statement. While it may well have been appropriate for DOE to have raised the matter during discussions, under the circumstances here, we do not believe Holmes was prejudiced

by this. Further, based on our review of the record, we believe that the other matters which Holmes argues were inadequately addressed in discussions--the qualifications of Holmes' ES&H manager and Holmes' use of a subcontractor for subsurface activities--were raised in a manner that reasonably should have led Holmes into the areas of its proposal that concerned the evaluation panel.

First, DOE explains that during oral discussions, the SEB questioned Holmes' ES&H manager about his safety and health experience. According to the agency, although the manager indicated his limitations with regard to safety and health experience, Holmes made no changes in this area of its proposal. Second, two of the written negotiation issues addressed to Holmes were "Organizational structure and proposed span of control at all levels," and "Technical or business management problems which may arise under your proposed organizational relationship with respect to your major subcontractor(s)." The protester continuously refers to this problem as a DOE objection to the use of a subcontractor per se. In our view, that was not the case; rather, DOE's problems centered on the particular organization proposed by Holmes and, although Holmes responded to these organizational issues in its revised offer, the record shows that the evaluators' concerns in these areas simply were not satisfied.


The protester also has generally contended that it was not treated equally in that more detailed discussions were held with Raytheon which permitted that firm to improve its deficient initial proposal significantly. The extent and content of discussions are within the discretion of the contracting officer since the issues required to be discussed will vary among the proposals. Consequently, the agency should, as it did here, individualize the discussions with each offeror. Pan Am World Servs. Inc.; Base Maintenance Support Group; Holmes & Narver Servs. Inc., B-231840; B-231840.2; B-231840.3, Nov. 7, 1988, 88-2, CPD ¶ 446.

Here, both offerors were treated equally with respect to discussions in that they both were presented with a written list of issues to be covered in oral discussions and were told that they could respond to those issues and other matters raised during oral discussions in their revised proposals. Generally, the areas of concern identified for Holmes and Raytheon were the same with the notable exception that the written list sent to Holmes raised the evaluators' concerns with Holmes' organizational relationship to its major subcontractor. Thus, the evaluators raised with Holmes, and gave that firm an opportunity to address, the

major area of concern with its proposal. Holmes' failure to fully resolve the evaluators concerns in this area cannot be attributed to a failure to raise the matter and there is no evidence in the record that Raytheon's ratings improved more than Holmes' due to the agency providing Raytheon with a greater opportunity to improve its proposal.

Finally, in its comments on the agency's report on the protest, for the first time, Holmes argued that DOE did not raise in negotiations its concern that Holmes proposed "insufficient safety personnel resources." Under our Bid Protest Regulations, a protest must be filed within 10 working days of when the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Where as here, a protester supplements a timely protest with new and independent grounds of protest, the later raised allegations must independently satisfy the timeliness requirements. Golden Triangle Management Group, Inc., B-234790, July 10, 1989, 89-2 CPD ¶ 26. Holmes' allegation that DOE should have discussed insufficient safety personnel is based on the evaluation documents and other information given to Holmes on June 19. Holmes did not raise this new contention until more than 10 days later when it filed its comments on the agency's report on July 17. Consequently, this issue is untimely and will not be considered.

The protest is denied in part and dismissed in part.



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General Counsel